Supreme Court, U.S.
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No. 97-895

In The
Supreme Court Of The United States

October Term, 1997

MARK R. SEBASTIAN,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner was arrested on June 30, 1993 by the Connecticut State Police and charged with committing Breach of Peace, a misdemeanor under Connecticut law, on that date on Lantern Hill Road in the Town of North Stonington, Connecticut. The petitioner filed a motion to dismiss claiming that the State of Connecticut lacked subject matter jurisdiction because he is an Indian and the offense took place in Indian country.

At the hearing on the motion to dismiss, the petitioner and the state stipulated that the location of the alleged offense was the "Eastern Pequot", also known as the Paucatuck Eastern Pequot Reservation; that the Eastern Pequot Tribe, also known as the Paucatuck Eastern Pequot Tribe is recognized by the State of Connecticut as one of five indigenous Indian tribes in the State of Connecticut[1]; and that the Eastern Pequot Tribe has not been recognized as an Indian Tribe by the United States although an application for recognition had been filed in 1989

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1 In fact, the State of Connecticut recognizes the "Paucatuck Eastern Pequot Tribe", not the "Eastern Pequot Tribe", Connecticut General Statutes §47-63, but, based on the stipulation, the trial court concluded that the petitioner is a member of a tribe recognized by the State of Connecticut. Separate petitions for acknowledgment have been filed with the Bureau of Indian Affairs by groups calling themselves "the Paucatuck Eastern Pequot Tribe" and the "Eastern Pequot Tribe". Opinion below. State v. Sebastian 243 Conn. 114, 121-123 n11, n12, n13.

pursuant to 25 Code of Federal Regulations Part 83, and is under active consideration by the Bureau of Indian Affairs.

The Petitioner offered evidence which he claimed established his membership in the Eastern Pequot Tribe. The state objected on the ground that his membership in a tribe that is not federally recognized or acknowledged was irrelevant to the issue of whether or not the petitioner is an Indian for the purposes of criminal jurisdiction. The trial court sustained the state's objection and, when the petitioner offered no evidence that he was a member of a federally recognized or acknowledged Indian Tribe or that the area in question had any particular relationship with the federal government, the trial court denied the motion to dismiss.

The petitioner entered a conditional nolo contendere plea, which preserved his right to appeal under Connecticut law, to a reduced charge of creating a public disturbance and was fined $85.00 plus costs.

On appeal, the Connecticut Supreme Court affirmed the conviction below and held that a person who's claim of being an Indian is based solely on a claim of membership in a group that is not acknowledged as an Indian Tribe by the United States is not an Indian for the purpose of criminal jurisdiction. The Connecticut Supreme Court expressly did not decide whether the offense took place in Indian country.

REASONS FOR DENYING THE WRIT

The petitioner seeks a writ of certiorari on the question "[w]hether, under Article I, Section Eight, of the United States Constitution, a member of a state recognized Indian Tribe that

has not waived its sovereign immunity is subject to state criminal jurisdiction for an infraction occurring on the reservation[.]". Actually the only issue presented by the record below is whether or not a person who's sole basis for claiming to be an Indian is membership in a tribe that has not been recognized or acknowledged as an Indian Tribe by the United States can be an Indian for the purpose of criminal jurisdiction.

The Connecticut Supreme Court framed the issue as "...whether the State of Connecticut has jurisdiction over a defendant who is a member of an Indian tribe that has not been acknowledged by the federal government but whose application for acknowledgment is pending with the Federal Bureau of Indian Affairs (BIA)", Petition, A3, and held that the state does have jurisdiction.

This decision is consistent with the only United States court of appeals decision which directly addressed this issue. LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993). It is also consistent with principles set forth by this court.

Article I, §8 of the United States Constitution provides that "[t]he Congress shall have the power...[t]o regulate commerce with the Indian Tribes." This divests the state of "virtually all authority over Indian commerce and Indian tribes." Seminole Tribe of Florida v. Florida, 517 U.S. , 116 S. Ct. 1114, 1126, 134 L.Ed. 2d 252 (1996). The foundation of the federal government's special criminal jurisdiction over crimes involving Indians in Indian country is not the protection of members of a racial group. It is instead the recognition by the federal government of a special government to government relationship with particular Indian tribes. United States v. Antelope, 430 U.S. 641, 646, 97 S.Ct.1395, 1399, 51 L.Ed 701

(1977). Whether this special relationship exists between the United States and a particular tribe is, as both the court below, at 243 Conn. 137 (Petition A22) and the 9th Circuit in LaPier v. McCormick, supra, 986 F.2d 304-305, noted, a matter for the "political departments." Baker v. Carr, 369 U.S. 186, 215, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

The Bureau of Indian Affairs has developed expertise in this field and has created a structured administrative process enabling it to utilize its expertise in applying appropriate standards to determine which tribes should be acknowledged as having a special relationship with the United States. Golden Hill Paugussett Tribe of Indians v. Weicker, 39, F.3d, 51, 60 (2nd Cir. 1994). 25 Code of Federal Regulations, Part 83. The tribe which the petitioner claims to belong to has invoked this process and its application for acknowledgment is presently being considered.

The petitioner claims that the opinion below conflicts with that of the Second Circuit in Golden Hill Paugussett v. Weicker, supra, because in that case, which is a land claims action, the court stayed the action for BIA to act on Golden Hill's application for acknowledgment, rather than dismissed it. Due to the different nature of these two cases, as noted in the opinion below, 243 Conn. 148-153, there is no conflict between the two holdings. The limited role that federal acknowledgment plays in land claims actions under the Nonintercourse Act compared with the critical role it plays in the government to government relationship underlying federal criminal jurisdiction and the serious constitutional and practical problems which would arise from staying this case militate against staying this case. 243 Conn. 148-153. (Petition A33-A38) There is no conflict between this opinion and the Second Circuit's opinion

in Golden Hill on the substantive issue presented by this petition for certiorari.

As the court below noted, this cases involves the prosecution of an individual and principles of tribal sovereign immunity as recognized by this court are not implicated. 243 Conn. 158-162. (Petition A42-A46). It is federal pre-emption rather than the concept of tribal sovereignty which operates as a bar to state jurisdiction. McLanahan v. Arizona Tax Commission, 411, U.S. 164, 172, 93 S. Ct. 1257, 36 L.Ed. 2d 129 (1973).

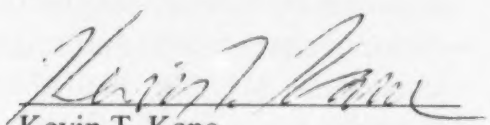
This case does not involve a conflict between the opinion below and an opinion of this court or that of a United States court of appeals. The group which the petitioner claims to be a member of has filed an application for acknowledgment with the BIA, which is the appropriate "department" to decide whether to acknowledge the petitioner's tribe.

This petition does not present an important federal question which ought to be resolved by this court.

CONCLUSION

For the above reasons, the Respondent-State of Connecticut respectfully requests that the petition for a writ of certiorari be denied.

Respectfully Submitted,



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